LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 19 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

v.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Of Counsel:

STRADLEY, RONON STEVENS & YOUNG,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE,
111 West Washington Street,
Chicago, Illinois. 60602

HERBERT G. KEENE, JR.,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LAWRENCE M. COHEN,
111 West Washington Street,
Chicago, Illinois. 60602

Attorneys for Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
A. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	5
B. The Decision Below Directly Conflicts With the Decisions of the First Circuit and Other Federal Courts	9
C. This Court Should Determine Whether State Welfare Assistance Improperly Infringes Upon the Federal Labor Policy of Free Collective Bargaining	10
CONCLUSION	14
APPENDIX:	
Court of Appeals Opinion	A1
Court of Appeals Judgment	A29
Court of Appeals Order Granting Amicus Status to United States Chamber of Commerce	A31
Court of Appeals Order Denying Appellants' Petition for Rehearing	A32
Court of Appeals Order Denying Petition for Rehearing of United States Chamber of Commerce	A33
Supreme Court Order Extending Time to File Petition for Writ of Certiorari	A34
District Court Oral Opinion	A35
District Court Order Denying Motion for Preliminary Injunction and Dismissing Action	A37
Statutes Involved	A39

TABLE OF CASES CITED.

	Page
Aeronautical Lodge 727 v. Campbell, 337 U. S. 521 (1949) ..	8
Almacs, Inc. v. Hackett, 312 F. Supp. 964 (D. R. I. 1970) ..	8, 9, 11
Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO, 447 F. 2d 945 (7th Cir., 1971)	6
Avco Corp. v. Local 787, UAW, 459 F. 2d 968 (3rd Cir. 1972)	6
Carroll v. President and Commissioners of Princess Anne County, 393 U. S. 175 (1968)	6
Dandridge v. Williams, 397 U. S. 471 (1970)	11
Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963)	7
Francis v. Davidson, 340 F. Supp. 351 (D. Md.), aff'd per curiam, 409 U. S. 904 (1972)	9, 11
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 (1946)	8
General Dynamics Corp. v. Local 5, Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, 469 F. 2d 848 (1st Cir. 1972)	6
Gray v. Sanders, 372 U. S. 368 (1963)	6
Grinnell Corp. v. Hackett, — F. 2d —, 82 LRRM 2986 (1st Cir. 1973)	8, 9, 10, 11, 12
ITT Lamp Division v. Minter, 435 F. 2d 989 (1970), cert. den., 402 U. S. 933, reh. den., 404 U. S. 874 (1971)	4, 9, 10, 11, 12
Johnson v. New York State Education Department, — U. S. —, 34 L. Ed. 2d 290 (1972)	6
Lascaris v. Wyman, 82 LRRM 2634 (1972)	9, 11
Liner v. Jafco, Inc., 375 U. S. 301 (1964)	13
Local No. 8-6, Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Missouri, 361 U. S. 363 (1960)	3, 7
Local 1976, Carpenters v. N. L. R. B., 357 U. S. 93 (1958) ..	6
Moore v. Ogilvie, 394 U. S. 814 (1969)	6
Motor Coach Employees v. Lockridge, 403 U. S. 274 (1971)	13

TABLE OF CASES CITED (Continued).

Page

N. L. R. B. v. Globe Wernicke Systems Company, 336 F. 2d 589 (6th Cir. 1964) 6

N. L. R. B. v. Local 825 Operating Engineers, 400 U. S. 297 (1970) 6

N. L. R. B. v. Marsh Supermarkets, Inc., 327 F. 2d 109 (7th Cir. 1963) 6, 7

N. L. R. B. v. Mexia Textile Mills, 339 U. S. 563 (1958) 6

N. L. R. B. v. Newark Morning Ledger, 120 F. 2d 262 (3rd Cir.), cert. den., 314 U. S. 693 (1941) 8

N. L. R. B. v. Plumbers Union of Nassau County, Local 457, 299 F. 2d 497 (2nd Cir. 1962) 6

N. L. R. B. v. Raytheon Company, 398 U. S. 25 (1970) 6, 7

N. L. R. B. v. United Hatters, 286 F. 2d 950 (4th Cir. 1961) 6

Pacific Maritime Ass'n v. Longshoremen, 454 F. 2d 262 (9th Cir. 1971) 6

Roe v. Wade, — U. S. —, 35 L. Ed. 2d 147 (1973) 6

Russo v. Kirby, 453 F. 2d 548 (2nd Cir. 1971) 11

Sibron v. New York, 392 U. S. 40 (1968) 6

Solien v. Miscellaneous Drivers and Helpers Union, Local No. 610, 440 F. 2d 124 (8th Cir. 1971) 10

Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498 (1911) 6, 9

The Dow Chemical Co. v. Taylor, 57 FRD 105 (E. D. Mich. 1972) 11, 12

United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U. S. 199 (1968) 6

United States v. W. T. Grant Co., 345 U. S. 629 (1953) 6, 10

STATUTES CITED.

	Page
Federal Rules of Civil Procedure, Rule 12(b)(6)	12
National Labor Relations Act, as amended (29 U. S. C. § 141 et seq.	3
New Jersey's General Public Assistance Law (NJSA 44:8-107 et seq.)	3, 4
New Jersey's Regulation on Payment of Welfare Assistance to Strikers	3
New Jersey's Assistance for Dependent Children Law (NJSA 44:10-1 et seq.)	3, 4
Social Security Act of 1935, as amended (42 U. S. C. § 602 et seq.)	3
New Jersey's Assistance to Families of the Working Poor Law (NJSA 44:13-1 et seq.)	3, 4
28 U. S. C. § 1254(1)	2
United States Constitution, Article VI	3

AUTHORITIES CITED.

Page

American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, pp. 293-301 13

Comment, Welfare for Strikers: ITT v. Minter, 39 U. Chi. L. Rev. 79 (1971) 8

Harsh & Robinson, Little Impact Seen in 90-Day Steel Strike, Chicago Sun-Times, Aug. 1, 1971, at p. 7, col. 1 13

Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955) 5

Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970) 5, 10

Note, The Postman Always Rings Twice, 65 Col. L. Rev. 867 (1965) 5

Thieblot and Cowin, Welfare and Strikes: The Use of Public Funds to Support Strikers, University of Pennsylvania, Wharton School of Finance and Commerce (1972) 8, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No.

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION; AND A. ROBERT SCHAEVITZ,
Petitioners,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Super Tire Engineering Company, Supercap Corporation, and A. Robert Schaevitz petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 22, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals (App., *infra*, pp. A1-A28) is reported at 469 F. 2d 911. The United States District Court for the District of New Jersey filed no formal written opinion; its oral opinion is set forth at App., *infra*, pp. A35-A36.

JURISDICTION.

The judgment of the Court of Appeals (App., *infra*, pp. A29-A30) was entered on November 22, 1972. A timely petition for rehearing was denied on December 20, 1972 (App., *infra*, pp. A32-A33). On March 12, 1973, this Court granted Petitioners' Application for an Extension of Time within which to file this petition to and including May 19, 1973 (App., *infra*, p. A34). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. The issue of whether State welfare assistance to strikers unconstitutionally interferes with the federal labor policy of free collective bargaining is a recurrent question

of significant national importance. Is this issue rendered moot by termination of a particular strike in a particular case, notwithstanding the continuing effect of such assistance upon the parties' collective bargaining relationship, and the fact that, if considered moot, the question will be inherently evasive of appellate review?

2. Does the application of the mootness doctrine in a labor context require, by reason of *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, 361 U. S. 363 (1960), a different rule of law than that articulated by this Court and other federal courts with respect to non-labor controversies?

3. Does the State grant of welfare assistance to strikers contravene federal labor policy by insulating one party—the striking union—from the economic disadvantages of a strike, and thus deviate from the State's required neutral position in collective bargaining?

CONSTITUTIONAL PROVISION INVOLVED.

Article VI, Clause 2, of the United States Constitution is set forth at App., *infra*, p. A39.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. § 141 *et seq.*), New Jersey's General Public Assistance Law (NJSA 44:8-107 *et seq.*), New Jersey's Regulation on Payment of Welfare Assistance to Strikers, New Jersey's Assistance for Dependent Children Law (NJSA 44:10-1 *et seq.*), the Social Security Act of 1935, as amended (42 U. S. C. § 602 *et seq.*), and New Jersey's Assistance to Families of the Working Poor Law (NJSA 44:13-1 *et seq.*), are set forth at App., *infra*, pp. A39-A61.

STATEMENT OF THE CASE.

On May 14, 1971, employees of Petitioner-Employers represented by Respondent Teamsters Local Union 676, in support of their collective bargaining demands, commenced a strike which was to last for a full six weeks until June 28, 1971. After ascertaining that many of the strikers were receiving welfare assistance from the State of New Jersey,[1] the instant suit was filed on June 10, 1971 seeking both declaratory and injunctive relief. The complaint alleged that such State subsidization of strikers, by necessarily prolonging strikes and/or increasing the cost of a strike settlement, frustrates the national labor policy of free collective bargaining and thereby contravenes the Supremacy Clause of the Constitution.

On June 24, 1971, the District Court, without holding an evidentiary hearing, dismissed the action, relying on *ITT Lamp Division v. Minter*, 435 F. 2d 989 (1970), *cert. den.*, 402 U. S. 933, *reh. den.*, 404 U. S. 874 (1971) (App., *infra*, pp. A35-A36). Appeal was thereafter taken to the Third Circuit which, on November 22, 1972, in a 2-1 decision (Gibbons, J., dissenting), dismissed the appeal as moot with directions to the District Court, on remand, to vacate its order and dismiss for the same reason (App., *infra*, pp. A1-A28). The panel majority, although observing that because ". . . of the time required to perfect appeals both to this Court and to the Supreme Court, review may be unavailable in the majority of cases such as this" (App., *infra*, p. A15), nevertheless concluded that while this Court's

1. Such payments were being made under New Jersey General Public Assistance, NJSA 44:8-107 *et seq.*, a State program, and Aid for Dependent Children (AFDC), NJSA 44:10-1 *et seq.*, a joint State-federal program. App., *infra*, pp. A40-A56). Effective June 30, 1971, after commencement of this action, New Jersey elected no longer to participate in the unemployed parent segment of the AFDC program and enacted, in lieu thereof, its Assistance to Families of the Working Poor program, NJSA 44:13-1 *et seq.*, which also provides benefits to striking employees (App., *infra*, pp. A57-A61).

recent pronouncements on mootness in other contexts ". . . perhaps indicat[e] some lessening of the mootness stricture, [they] do not appear to affect the vitality of *Oil Workers* in a labor context. If *Oil Workers* is to be found not harmonious with the current contours of the mootness doctrine, that decision should, and perhaps must, be made by the U. S. Supreme Court." (App., *infra*, p. A20). A subsequent petition for rehearing was denied by the Court of Appeals on December 20, 1972 (App., *infra*, pp. A32-A33).

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Mootness questions present "a recurrent problem" for this Court which "have not evoked a consistent response"; the mootness doctrine, perhaps as a result, has become "unnecessarily confused and restrictive in light of justiciable philosophy."[2] The instant case presents an appropriate vehicle for this Court to resolve such confusion and provide guidance for the lower federal courts. It also squarely raises the question of whether this Court's decision in *Oil Workers* was intended, as construed by the Court of Appeals (App., *infra*, p. A20), to create an exception to the "current contours of the mootness doctrine" for cases arising in a labor context. This question, which constitutes a substantial and recurrent problem in the administration of national labor policy, is also worthy of resolution by this Court.

---

2. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1674, 1687 (1970). See also, Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955); and Note, *The Postman Always Rings Twice*, 65 Col. L. Rev. 867 (1965).

This Court, in both labor[3] and other[4] controversies, has recognized that the critical question in determining mootness is not whether there has been a settlement of the underlying dispute but, rather, whether the question presented is an important one which, unless resolved, is likely to recur. *Moore*, for example, involved a challenge to the validity of a statute whose provisions effectively deprived the complainant of the opportunity to run for elective office; although the election had already taken place when the case came before the Court, the statute which caused the alleged deprivation, with its prospective deterrent effect, remained in full force and precluded a finding of mootness. Similarly, although the short-term order of the Interstate Commerce Commission involved in *Southern Pacific* had expired pending review, the possibility that, absent determination, the Commission's order was "capable of repetition, yet evad-

3. See, e.g., *N. L. R. B. v. Raytheon Company*, 398 U. S. 25 (1970); *N. L. R. B. v. Local 825 Operating Engineers*, 400 U. S. 297 (1970); *N. L. R. B. v. Mexia Textile Mills*, 339 U. S. 563 (1958); and *Local 1976, Carpenters v. N. L. R. B.*, 357 U. S. 93 (1958). See also, *N. L. R. B. v. Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963); *N. L. R. B. v. United Hatters*, 286 F. 2d 950 (4th Cir. 1961); *N. L. R. B. v. Plumbers Union of Nassau County, Local 457*, 299 F. 2d 497 (2nd Cir. 1962); *N. L. R. B. v. Globe Wernicke Systems Company*, 336 F. 2d 589 (6th Cir. 1964); *Pacific Maritime Assn. v. Longshoremen*, 454 F. 2d 262 (9th Cir. 1971); *Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers Int'l. Union, AFL-CIO*, 447 F. 2d 945 (7th Cir. 1971); *General Dynamics Corp. v. Local 5, Shipbuilders*, 469 F. 2d 848 (1st Cir. 1972); and *Avco Corp. v. Local 787, UAW*, 459 F. 2d 968 (3rd Cir. 1972).

4. See, e.g., *Moore v. Ogilvie*, 394 U. S. 814 (1969); *Sibron v. New York*, 392 U. S. 40 (1968); *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911); *United States v. W. T. Grant Co.*, 345 U. S. 629 (1953); *Carroll v. President and Commissioners of Princess Anne County*, 393 U. S. 175 (1968); *United States v. Concentrated Phosphate Export Ass'n., Inc.*, 393 U. S. 199 (1968); *Gray v. Sanders*, 372 U. S. 368 (1963); *Johnson v. New York State Education Department*, — U. S. —, 34 L. Ed. 2d 290 (1972) (Marshall, J., concurring); and *Roe v. Wade*, — U. S. —, 35 L. Ed. 2d 147 (1973).

ing review" also assured a viable controversy. And in *Raytheon*, this Court held an unfair labor practice dispute not to be moot although the alleged unlawful conduct had ceased and the respondent had fully complied with the Labor Board's remedial order. The test has thus been whether an important matter of general significance is at issue, either continuing in effect or likely to recur, and not, as presumed by the Court below in a labor context, whether the immediate situation which gave rise to the action has been terminated.

There is no reason to differentiate a labor dispute from any other controversy in applying the mootness doctrine.[5] Indeed, as the cases previously noted (see n. 3, *supra*) demonstrate, labor disagreements are even more likely than other actions "to be repeated" and preclude "a decision as to . . . legality . . . [from becoming] a futile exercise of jurisdiction." *N. L. R. B. v. Marsh Supermarkets, Inc.*, 327 F. 2d at 111. Collective bargaining, after all, is a "continuing and developing process . . . [and] not a detached and isolated procedure which, once reflected in a written agreement, becomes a final and

5. *Oil Workers*, it is submitted, does not require that in every case where there has been a termination of the underlying controversy, the mootness doctrine must be applied. There, the temporary, emergency seizure of a public utility, which had expired by its own terms three years prior to review by this Court, made the possibility of recurrence understandably speculative and remote, and thereby precluded entry of a meaningful order. 361 U. S. at 366, 367, 371. Here, however, recurrence is not merely conjecture, but a virtual certainty, and termination of Petitioners' strike by no means barred entry of a meaningful order resolving the disagreement as to whether New Jersey may grant welfare benefits to strikers. See, e.g., *Division 1287, Bus Employees v. Missouri*, 374 U. S. 74 (1963), the sequel to *Oil Workers*, which, as the dissent below observed, ". . . is quite closely on point, for it recognizes that the availability of state interference can have an ongoing effect upon the collective bargaining relationship, and that a controversy over such availability is not moot, as long as the affected relationship exists. . . ." (App., *infra*, p. A27).

permanent result";[6] the availability of State welfare assistance to strikers, accordingly, has a continuing impact which is not dissipated by the termination of a particular strike.[7] New Jersey, moveover, as the dissent below observed (App., *infra*, pp. A23-A24), "has no present intention of changing its policy with respect to such payments"; and that policy will continue to be challenged, therefore, by either the instant Petitioners or other employers.[8] This Court should determine whether in such circumstances, solely by reason of the fact that such a controversy arises in a labor context, there is an appropriate basis for finding mootness. As the dissent below concluded, "The issues in this case are of considerable public interest, and likely to recur. Over-anxiety on the part of the federal courts to find such cases non-justiciable is not consistent with our judicial obligations" (App., *infra*, pp. A27-A28).

---

6. *N. L. R. B. v. Newark Morning Ledger*, 120 F. 2d 262, 267 (3rd Cir. 1941), *cert. den.*, 314 U. S. 693 (1941). See also *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946); and *Aeronautical Lodge 727 v. Campbell*, 337 U. S. 521 (1949).

7. See, e.g., Thieblot and Cowin, *Welfare and Strikes: The Use of Public Funds to Support Strikers*, University of Pennsylvania, Wharton School of Finance and Commerce (1972); Comment, *Welfare for Strikers: ITT v. Minter*, 39 U. Chi. L. Rev. 79 (1971); and *Almacs, Inc. v. Hackett*, 312 F. Supp. 964, 967 (D. R. I. 1970).

8. The Court of Appeals acknowledged that, ". . . it is important to note the intervention of the Teamsters Union and the participation, *amicus curiae*, of the Chamber of Commerce of the United States. The presence of these parties does suggest an on-going interest in the issue raised in this litigation" (App., *infra*, p. A14). In fact, the Chamber repeatedly sought to intervene in these proceedings, *inter alia*, to avoid a finding of mootness but was granted only *amicus* status (App., *infra*, p. A31). *Cf., Grinnell Corp. v. Hackett*, — F. 2d —, 82 LRRM 2986, 2989-90 (1973): ("Moreover, the intervening Chambers of Commerce, who have filed their own complaint for declaratory and injunctive relief, represent many other employers in Rhode Island, as to at least some of whom the issue is certain to recur.")

B. The Decision Below Directly Conflicts With the Decisions of the First Circuit and Other Federal Courts.

The precise issue here presented—whether settlement of an underlying controversy moots the issue of the constitutional validity of the State grant of welfare assistance to strikers—has arisen before in several other federal courts. In each instance, rather than carving out a different rule for labor cases or viewing *Oil Workers* as controlling, the courts held the dispute not to be moot. The instant case presents the singular exception.

In *ITT Lamp Divisions, v. Minter, supra,* the case deemed controlling by the District Court, for example, the First Circuit concluded, that, although the strike there involved had terminated, *Southern Pacific* was dispositive; the Court noted that the legality of welfare payments to strikers was an issue which "has earlier vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the 'recurring question' category where significant public rights are involved and court review ought not, if possible, be avoided." 435 F. 2d at 991. This view was reaffirmed by the First Circuit again on March 15 of this year in *Grinnell Corp. v. Hackett,* n. 8, *supra.* There, the Court specifically held, again in an identical factual situation, that, since the issue would recur either as to the plaintiff in that case or other employers, ". . . a case such as this is not moot, although the particular strike which prompted the suit and the payment of benefits challenged have, as here, terminated by the time of appeal." 82 LRRM at 2989.

The three-judge Maryland District Court in *Francis v. Davidson,* 340 F. Supp. 351 (D. Md.), *aff'd per curiam,* 409 U. S. 904 (1972), the Rhode Island District Court in *Almacs, supra,* and the New York Court of Appeals in *Lascaris v. Wyman,* — N. Y. —, 82 LRRM 2634 (1972), all reached a similar non-mootness result, notwithstanding cessation of

the underlying strike, in welfare-to-striker situations. Moreover, the approach taken here by the Third Circuit has also been expressly rejected by the Eighth Circuit. In *Solien v. Miscellaneous Drivers and Helpers Union, Local 610,* 440 F. 2d 124, n. 5 (1971), that Circuit, relying on *ITT Lamp Division,* quoted this Court's declaration in *Grant,* n. 4, *supra,* that ". . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . A controversy may remain to be settled." *Solien* concluded, in marked contrast to the decision below in this case, ". . . that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justiciable cases . . . the policy of ensuring judicial review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness." 440 F. 2d at 127-128.

It is the very question of whether, in labor cases as opposed to other controversies, the rule should be that of *ITT, Grinnell* and *Solien,* or the diametrically opposite approach of the Third Circuit, which is presented by this case. The "real . . . choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity." *Id.* at 128, citing Note, 83 Har. L. Rev., n. 2, *supra,* at 1692. This choice is a critical one. It is one which should be made, accordingly, by this Court.

C. This Court Should Determine Whether State Welfare Assistance Improperly Infringes Upon the Federal Labor Policy of Free Collective Bargaining.

The fundamental issue raised in this case—which the Court of Appeals declined to decide as moot—is whether

State welfare assistance which subsidizes the striking union in a labor dispute unconstitutionally deviates from the neutral position required of a State by federal labor policy. Although the Court has declined to decide this question on other occasions,[9] in view of the substantial litigation [10] and dissension [11] which has been engendered by the absence of a definitive determination, it is respectfully submitted that, should this Court find that the Third Circuit erred in its application of the mootness doctrine, the instant case should also be utilized to resolve this nationally significant problem. This issue is one of importance to every employer and employee whose industrial relations are governed by a collective bargaining agreement, as well as to those who must exercise the ". . . difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U. S. 471, 487 (1970). It is, therefore, also a question which warrants this Court's attention.

---

9. Review was denied in *ITT* (402 U. S. 933; 404 U. S. 874), notwithstanding the almost unprecedented effort by *eleven* States to obtain review in that case, and in *Francis* (409 U. S. 874). Counsel for Petitioners have been advised that the State of Rhode Island will file a petition for certiorari this month in *Grinnell*, and that the respondents there contemplate filing a cross-petition. The welfare-to-striker question in the instant case, if considered in conjunction with the unemployment compensation-to-striker issue in *Grinell*, would thus provide the Court with the opportunity to explore all aspects of this critical area.

10. See, e.g., *ITT; Grinnell; Francis; Lascaris; Almacs; Russo v. Kirby*, 453 F. 2d 548 (2nd Cir. 1971); *The Dow Chemical Co. v. Taylor*, — F. Supp. —, 57 F. R. D. 105 (1972).

11. Following the Court's summary affirmance in *Francis*, for example, the Department of Health, Education and Welfare announced that it would entertain comments from interested parties on a clarification of its regulations as to whether strikers were entitled to AFDC payments. 38 Fed. Reg. No. 1 (Jan. 3, 1973). More than 10,000 responses were received, and the proposed revision is still under Departmental study. 77 Daily Labor Report A-7 (April 20, 1973). A decision by this Court establishing whether, in fact, such payments are constitutionally permissible would, of course, significantly alleviate this controversy and HEWs resultant difficulties.

The courts which have considered the welfare-to-striker issue are in disagreement. The decision of the District Court, for example, which dismissed Petitioners' complaint under Rule 12(b)(6), F. R. C. P., without an evidentiary hearing on the basis that *ITT* had held that such an issue was not justiciable, is in obvious conflict with the First Circuit's own explication of *ITT* in *Grinnell* that the issue is substantial and "justiciable, albeit complex." 82 LRRM at 2788. *Grinnell,* therefore, as well as *Dow,* n. 10, *supra,* held that motions to dismiss prior to an evidentiary hearing should be denied; the District Court in this case granted precisely such a motion. This serious dislocation of welfare and labor policy, occurring in an area which threatens the very existence of collective bargaining,[12] requires resolution. The States, like the judiciary, have taken divergent views of their responsibilities;[13] the continuing dispute as to the payment of welfare benefits to strikers has threatened other welfare pro-

12. As Dr. Herbert Northrup of the University of Pennsylvania, an acknowledged expert in the field, declared in an affidavit submitted to the court below, "I do not think collective bargaining can in fact exist if we continue to support strikes by paying public benefits to private strikers. . . . I cannot see how collective bargaining can function effectively if the trend toward welfare benefits for strikers continue[s] at the present pace."

13. Cf., e.g., the position of Iowa in its *amicus* brief in support of the petition for rehearing in *ITT* (p. 3) ("the State of Iowa believes that allowing welfare assistance to persons on strike contravenes the Federal statutory scheme manifesting the general policy of free collective bargaining") with that of Massachusetts in its brief in opposition in that case (p. 5) (". . . the court of appeals [here] reached the only possible conclusion—substantial doubt that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers . . ."). The States, in short, do not now know whether their requisite neutrality in a labor dispute demands the withholding of welfare assistance from strikers (*amicus* brief of Wyoming in support of the pet. for reh., in *ITT,* p. 4) or whether, conversely, they may provide such benefits since "the asserted conflict involve[s] only a 'tangential frustration' of unfettered collective bargaining." Mass. Br. in Opp. in *ITT,* p. 5.

grams;[14] and the present conflict also jeopardizes, by permitting a striker in one State to receive a government subsidy while his counterpart a few miles away is denied such assistance, the need for "stabilizing labor relations conflict" through "a comprehensive national labor law." *Motor Coach Employees v. Lockridge*, 403 U. S. 274, 286 (1971). This Court should be particularly ". . . astute to avoid hindrances in the way of taking up . . ." a question of this magnitude. *Liner v. Jafco, Inc.*, 375 U. S. 301, 306 (1964).[15]

---

14. See, e.g., Thieblot and Cowin, *supra* n. 7, at pp. 124-5, 129-31; see also, Harsh & Robinson, *Little Impact Seen in 90-Day Steel Strike*, Chicago Sun-Times, Aug. 1, 1971, at p. 7, col. 1, quoting David Daniel, Director of the Cook County (Ill.) Department of Public Aid, to the effect that a long steel strike could deplete his agency's annual allotment and "boost the welfare roles immeasurably."

15. As the Committee on State Labor Law of the Section of Labor Relations Law of the American Bar Association stated in its 1972 Report: "The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion. (footnotes omitted)." American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, pp. 293-301.

CONCLUSION.

For all the foregoing reasons, Petitioners respectfully urge that this Court grant the petition for writ of certiorari.

Respectfully submitted,

Of Counsel:
STRADLEY, RONON,
STEVENS & YOUNG,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE,
111 West Washington
Street,
Chicago, Illinois 60602

HERBERT G. KEENE, JR.,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LAWRENCE M. COHEN,
111 West Washington Street,
Chicago, Illinois 60602
Attorneys for Petitioners.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773, 71-1774 AND 71-1775.

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION: AND A. ROBERT SCHAEVITZ,
Appellants,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY, WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellees.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued September 14, 1972.

Before McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 22, 1972)

ADAMS, *Circuit Judge.*

In this case, appellants claim three New Jersey welfare programs [1] that provide benefits to certain striking workers, violate the federal constitution, federal statutes and state statutes. Appellants,[2] alleging that their employees while engaged in an economic strike received aid under the challenged programs, sought an injunction restraining various New Jersey officials, appellees here,[3] from continuing to provide payments to the workers under these programs.

It is forcefully contended that these welfare programs directly interfere with free collective bargaining, a federal policy enunciated in the Labor Acts, 29 U. S. C. §§ 157-8, and are unconstitutional because they contravene the Supremacy Clause of the U. S. Constitution. They further assert that the inclusion of striking employees in the programs abridges the federal statute under which one of the programs is funded,[4] and the New Jersey statutes pursuant

---

1. There has been considerable confusion over which welfare programs New Jersey currently operates. From oral argument and subsequent memoranda it appears that appellants are challenging the following three programs: Aid for Dependent Children (A. F. D. C.), N. J. S. A. 44:10-1 *et seq.*, a joint state-federal program; Aid to Families of the Working Poor, N. J. S. A. 44:13-1 *et seq.*, a state program; General Public Assistance, N. J. S. A. 44:8-107 *et seq.*, a state program.

2. Appellants, Super Tire Engineering Company and Supercap Corporation, are New Jersey corporations; appellant, A. Robert Schaevitz, is a citizen of and taxpayer of New Jersey, as well as president and chief executive officer of appellant corporations.

3. The Teamsters Local Union No. 676, the certified collective bargaining representative for all production and maintenance employees of the corporate-appellants, was granted permission by the District Court to intervene on behalf of the defendant-appellees.

4. A. F. D. C. is a joint federal-state program created by § 402 of the Social Security Act, 42 U. S. C. § 602.

to which the state officials have promulgated regulations affecting striking employees.[5]

Critical to our disposition of the case, is the sequence of events. On May 14, 1971, at the conclusion of a three-year contract, negotiations having been to that point unfruitful, the employees began an economic strike. Shortly thereafter, as the employers allege, certain of the employees sought public assistance under one of the specific welfare programs. On June 10, 1971, the complaint giving rise to this litigation was filed, and on June 14 the District Court ordered that a hearing on the request for a preliminary injunction be held on June 24.[5a] At that hearing the state officials and the union moved to dismiss the employers' complaint pursuant to Rule 12b(6), F. R. Civ. P. The trial judge, persuaded by I. T. T. Lamp Division v. Minter, 435 F. 2d 989 (1st Cir. 1970), *cert. denied*, 402 U. S. 933, *rehearing denied*, 404 U. S. 874 (1971), on July 13 dismissed the complaint and the motion for a preliminary injunction.

The union states that the strike "ended immediately prior to the June 24, 1971 hearing." The employers allege that the "employees did not return to work until June 28, 1971." Under either factual situation, a new contract hav-

---

5. The question whether the regulations governing each of the programs comport with the New Jersey statute under which they are promulgated is one of state law. Resolution of that issue might render unnecessary a decision on the basic constitutional challenges. In such circumstances, it is normally the duty of federal courts to abstain, awaiting a definitive pronouncement from a state court on questions of state law. We do not address this issue because it would not be reached until the Court determines that the case is within its jurisdiction. Railroad Commission v. Pullman Co., 312 U. S. 496 (1941).

5a. The jurisdiction of the District Court was alleged to be grounded on 28 U. S. C. § 1331 and § 1337. The applicability of § 1337 need not be discussed, for, it appearing that the amount in controversy exceeds $10,000, jurisdiction can be based on § 1331.

ing been accepted and ratified,[5b] it is clear that the labor dispute undergirding this challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before appeals were filed or argued in this Court.

Although many important questions of law have been ably argued and briefed by both sides, it now appears to this Court that the resolution of the underlying labor dispute raises squarely the issue of mootness.

I.

Article III of the Constitution commands that the federal judicial power shall extend only to cases and controversies. Thus, lacking a case or controversy, the federal courts are without jurisdiction. In North Carolina v. Rice, 404 U. S. 244 (1971), the Supreme Court states explicitly that mootness is an article III jurisdictional issue, setting forth the fundamental considerations:

> "Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, Hayburn's Case, 2 Dall. 409 (1792), as interpreted in Muskrat v. United States, 219 U. S. 346, 351-353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. Oil Workers

5b. At the hearing before the District Court on plaintiffs' motion for a preliminary injunction, the transcript of which appears as pages 52a-72a of the appendix filed by plaintiff-appellants, counsel for the plaintiffs stated:

> ". . . the strike was ended as of yesterday in that our latest contract was ratified by the Union Membership yesterday and they plan a return to work tomorrow." Appendix at 65a.

Unions v. Missouri, 361 U. S. 363, 367 (1960). To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240-41 (1937). However, '[m]oot questions require no answer.' Missouri, Kansas & Texas R. Co. v. Ferris, 179 U. S. 602, 606 (1900). Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.' United States v. Alaska S. S. Co., 253 U. S. 113, 116 (1920), quoting California v. San Pablo & Tulare R. Co., 149 U. S. 308, 314 (1893); our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' Liner v. Jafco, Inc., 375 U. S. 301, 306 n. 3 (1964). See also Powell v. McCormack, 395 U. S. 486, 496 n. 7 (1969). Even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction. Henry v. Mississippi, 379 U. S. 443, 447 (1965). Liner v. Jafco, Inc., supra, at 304." 404 U. S. at 246.

Beyond these dictates, however, broad statements about mootness suffer the same infirmity as general discussions about most abstruse subjects.[6] Though mootness

6. In Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150 (1970), Justice Douglas ascribed to discussions of standing a quality equally applicable to discussions of mootness. "Generalizations about standing to sue are largely worthless as such." *Id.* at 151.

is a constitutional problem, an articulation of the specific parameters of the doctrine has never been assayed by the Supreme Court.[7] Rather, the doctrine of mootness is protean in nature, assuming different shapes at different times. Indeed, the recent cases confronting the issue would appear not to produce a unitary coherent line.

The problem of mootness presents a recurring refrain in several types of cases. Analysis of them reveals four concerns that the Supreme Court addresses in terms of mootness. They are: that some sort of judicial decree be possible, that the parties remain in a posture sufficiently adverse to insure effective litigation, that the issue in contention continue to be concrete, and that the issue not be one that will recur and yet be unreviewable. Beyond these observations, however, conclusions become difficult. This difficulty is at least in part attributable to the proximity of mootness to several other justiciability precepts, and the tendency of courts to become unclear as to just which doctrine is applicable. For example, the concern with sufficient adversity is related to the question of "standing," and the fear regarding loss of concreteness approaches ripeness. Further beclouding the problem is the seeming congruence, at times, of the jurisdictional requirements for declaratory judgments and the mootness doctrine. *See e.g.*, Golden v. Zwickler, 394 U. S. 103 (1969). In spite of the impediments involved in attempting to draw conclusions about the content of the mootness doctrine, the resolution of this case requires that the concerns to which mootness responds be developed.

The early mootness cases were bottomed on the Court's unwillingness to act unless it could issue a decree that would affect the legal rights of the parties to the litiga-

7. *See generally*, Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970); Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955).

tion. There frequently was no discussion of the underpinning of the concept, but it is clear that the Court considered that the phrase "judicial power" encompassed situations only in which an effective decree could be rendered, or that such a situation was not a "case" or "controversy." In Singer Manufacturing Co. v. Wright, 141 U. S. 696 (1891), a Georgia tax was alleged to discriminate impermissibly between two classes of retailers. Singer brought suit to enjoin collection of the tax as levied against it. Before the appeal reached the Supreme Court, Singer, still pursuing the litigation, paid the tax. Although acknowledging that an action for restitution, which would raise the same issues, might lie, the Supreme Court dismissed the case as moot because nothing remained to be enjoined. *See,* Commercial Cable Co. v. Burleson, 250 U. S. 360 (1919). *See generally,* Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1674-5 (1970).

Much of the recent motion in the mootness field has occurred in cases involving convicted criminals who have been released from prison. The leading cases, separated by twenty-five years, illustrate the Court's shift from emphasis on an effective decree to a more functional approach in the context of a criminal situation, looking for sufficient interest and adversity between the parties. Both St. Pierre v. United States, 319 U. S. 41 (1943), and Sibron v. New York, 392 U. S. 40 (1968), were challenges brought by persons whose prison terms had been completed. In *St. Pierre,* the court dismissed as moot, stating:

> "On the argument it was conceded that petitioner had fully served his sentence before certiorari was granted. We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate.

> A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. United States v. Alaska S. S. Co., 253 U. S. 113, 115-16, and cases cited; United States v. Hamburg-American Co., 239 U. S. 466, 475-77." 319 U. S. at 42.

See Parker v. Ellis, 362 U. S. 574 (1960). *Sibron*, however, was not held to be moot because, as the Court asserted, the brevity of the sentence made review before release impossible, and the enduring effects of the conviction assured that Sibron would diligently litigate the question, and in a concrete factual context. *See* Mancusi v. Stubbs, 408 U. S. 204 (1972). A lack of concreteness seemed the motivation for a finding of mootness in North Carolina v. Rice, *supra*. *See* Aikens v. California, 406 U. S. 813 (1972).

Another group of cases includes those in which something other than the passage of time creates the mootness problem.[8] This class of case involves changed circumstances or voluntary cessation of a questioned activity. Thus, changing conditions have at times led to an invocation of the mootness doctrine. In Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U. S. 582 (1961), the enactment of an amendment to a Sunday-closing statute, plus the election of a new prosecutor were held to moot an assault on the "Blue Laws." In Golden v. Zwickler, *supra*, Zwickler was challenging a New York statute prohibiting the distribution of anonymous handbills. The handbills he desired to distribute attacked Congressman Multer, an incumbent running for reelection

8. Cases dealing with elections that have taken place, orders that have expired before review, and injunctions that have lapsed, discussed *infra*, are a third type of case in which mootness occurs.

in 1964. Before the case was heard by the U. S. Supreme Court, Multer had become a Justice of the Supreme Court of New York. His target thus having been removed from active politics and unlikely to reappear, Zwickler's appeal was held not to be justiciable any longer.[9] These two cases exemplify the Court's concern both with the concreteness of the controversy and the continuing adverse nature of the parties. The same elements seem to be operative in SEC v. Medical Committee for Human Rights, 404 U. S. 403 (1972), where the ruling of the Commission that Dow need not include an anti-napalm proposal in its 1968 proxy solicitations was held no longer reviewable. The finding of mootness was based on Dow's voluntary inclusion of the proposal in its 1971 solicitation, the less-than-3% support that the proposal received at that time, and SEC regulations which permitted Dow to delete for three years a proposal with such limited support.[9a]

The most frequently quoted cases of the voluntary cessation type are United States v. W. T. Grant & Co., 345 U. S. 629 (1953) and United States v. Trans-Missouri Freight Assn., 166 U. S. 290 (1897). Both involved conduct by defendants claimed to be in violation of the antitrust laws. The defendants, in each case, ceasing the allegedly illegal activity, urged that the proceedings brought by the government had thus become moot. In each case the Court, looking to the public interest in enforcement of the antitrust law, and the possibility that the defendants might repeat the questioned activity, held that the cases were not moot. The decisive considerations in *Grant* and *Trans-*

9. As discussed earlier, Golden v. Zwickler, *supra,* is not technically a mootness case but one posing a problem under the declaratory judgment act. Nevertheless, it is frequently cited as a mootness case.

9a. *See* Johnson v. New York State Educ. Dep't, 41 U. S. L. W. 4018 (U. S. Nov. 20, 1972).

Missouri are not as clear as in some other mootness cases. Nevertheless, the interest of the government in seeing that its laws not be evaded by the practice of ceasing questioned activity when challenged, assure that the government will be an active litigant. The fact that the questionable activity was being conducted at the start of the litigation appeared to aid the Court by providing a concrete controversy.

Another line of cases dealing with mootness is comprised of those in which the passage of time has caused the immediate object of the litigation to become unobtainable. Typical are disputes that in some way challenge election laws. In these cases a private citizen is the plaintiff and the government is the defendant. The mootness problem arises because the election has passed. Three cases in which this issue appeared have been held moot, Brockington v. Rhodes, 396 U. S. 41 (1969); Hall v. Beals, 396 U. S. 45 (1969); and Socialist Labor Party v. Gilligan, 406 U. S. 583 (1972). *Brockington* was a suit brought by a would-be candidate for Congress seeking a writ requiring the election board to list his name on the ballot, a step the board had refused to take since the nominating petitions filed by the aspirant were short of the required number of signatures. The Supreme Court stated that because the election was passed, the case was moot since the only relief sought was now unavailing. *Brockington* would appear to be a return, perhaps anachronistically, to the "effective decree" standard.

Hall was a challenge to Colorado's six-month residency requirement for voting. An amendment to the statute reducing the requirement to two months, and the passage of the election were held to moot the appeal. Since the amendment reducing the residency requirement would have permitted the plaintiffs to vote, and, they would be eligible

to vote in the next election, this case is perhaps explained as a decision based on a lack of adversity.

In *Socialist Labor Party* the statute attacked as unconstitutional was amended, correcting many of the infirmities that had been alleged by the plaintiffs. The Socialist Labor Party attempted to keep their suit alive by pointing to an unamended oath provision. The Court, finding that the heart of the suit had been removed, refused to permit it to be pursued on this tangential issue.[10]

A greater number of cases wherein the election has passed have been held not moot. In Gray v. Sanders, 372 U. S. 368 (1963), Georgia's county-unit primary system was assailed. Though the use of the specific system had been enjoined in the district court, and the Democratic Party, whose primary was the one challenged, actually held the election on a popular basis, the Supreme Court did not find the case moot. The Court stated two reasons for proceeding to the merits. First, the district court's injunction regulated only the present election, and dismissal of the case would restore Georgia to the *status quo ante,* i.e., able to conduct future elections under the county-unit system. Second, citing United States v. W. T. Grant, *supra,* the Court held that the Democrats' voluntary abstention from the challenged activity did not guarantee such restraint in the next election. Though nowhere so articulated, this approach indicates that if the activity contraverted is imbedded in a statute, rendering high the

10. Similar to *Socialist Labor* is Diffenderfer v. Central Baptist Church, 404 U. S. 412 (1972). In *Diffenderfer,* the tax-exemption accorded a church owned parking lot under a Florida statute was questioned. After the statute was amended, the appeal reached the Supreme Court, which held that it would not decide speculative questions about the new statute, and that the matter was now moot. Both these cases thus seem to indicate that the Court will not act when the main issue has been resolved and only an incidental issue remains to be decided.

probability of repetition, and the complainants will suffer with each repetition, then there is sufficient adversity. *See* Bullock v. Carter, 405 U. S. 134, 141 n. 17 (1972). *See generally* Note, 83 Harv. L. Rev. at 1684-5.[11]

A final series of cases introduces another element into the mootness doctrine. These cases are brought by parties who suffer injury from effects of a short-lived government order. The Supreme Court has stated that if the impact of such order will always pass before review is possible, then the case is not moot, for a finding of mootness would foreclose any possibility of review. The progenitor of this type of suit is Southern Pacific Terminal Co. v. ICC, 219 U. S. 498 (1911). ICC had ordered Southern Pacific to cease giving preferences to certain shippers, the order to continue for two years. Southern Pacific's appeal from the order was not heard by the Supreme Court until after the two-year provision of the order had ended. Holding the case not moot, the Court stated that a finding of mootness would create a class of situations in which, because of the short duration of the directive, the government could

---

11. The Court in three recent election situations has held not moot cases on appeal after the election has passed. In Fortson v. Toombs, 379 U. S. 621 (1965), another case arising from Georgia, the Court vacated and remanded the decree of a three-judge district court, but did not hold the case moot. The vacation and remand, however, may well have been motivated by concerns approaching the concreteness element of the mootness doctrine.

Whitcomb v. Chavis, 403 U. S. 124 (1971), and Roudebush v. Hartke, 405 U. S. 15 (1972), arose in Indiana. In *Whitcomb*, a multi-member legislative-district plan was in question. Although after the election, the Court proceeded to decide this case because a finding of mootness followed by vacation of the lower court's order might result in the return of the challenged procedure and reinstitution of the lawsuit, which would raise the same issues.

In *Roudebush*, a suit involving the propriety of a state court's ordering a recount in a contest for the office of U. S. Senator, the constitutional issue of who is ultimately to judge the result of the race, the U. S. Senate or the state, remained clearly in contention, barring a finding of mootness.

engage in actions "capable of repetition, yet evading review." 219 U. S. at 515.

Recent cases have relied on this doctrine. In *Moore v. Ogilvey*, 394 U. S. 814 (1969), the petitioners had raised a challenge to an Illinois requirement that a potential nomineee amass signatures in fifty counties. Citing *Southern Pacific*, the Court held that this case was justiciable, though the election had passed, for if the 50-county requirement were not tested, there would be a high degree of certainty that it would continue to be controlling from election to election. The same considerations preserved the justiciability of an attack upon a Tennessee residency-for-voting requirement in Dunn v. Blumstein, 405 U. S. 330, 333-4 n. 2 (1972).

In Carroll v. President and Commissioners of Princess Anne County, 394 U. S. 175 (1968), the prevention of potentially inflammatory "white supremacist" rallies by a ten-day injunction was on appeal in the Supreme Court. The impossiblity of review of a ten-day injunction before its expiration and the persistence of the petitioners, both by pursuing the legal questions and by agitating with "continuing activities and programs," foreclosed a holding of mootness.

Having discussed these various components of the mootness doctrine, it remains to relate them to the assault on the "interpretive regulations" of New Jersey's welfare program presently before this Court. In many respects, this is a close case, with the arguments seeming to be nicely balanced.

The employers urged that they are suffering continuing injury from the mere existence of the welfare programs. Unless this argument is accepted, it appears that this case is moot. The only relief sought by the employers that could now be of any use would be a declaratory judgment.

Though such a declaration might not be impermissible, the considerations encompassed in the mootness doctrine need be addressed.

Adversity must be judged by an objective standard. Here, absent a continuing injury, the posture of the plaintiffs may not be sufficiently antagonistic. As in *Hall v. Beals, supra,* one who has been injured but will be impaired only in the future if certain speculative contingencies come to pass can no longer pursue the litigation. Moreover, the willingness of the state officials adequately to defend policies now threatened, not with an injunction, but only by a declaratory judgment, may be substantially diminished.[12] Having stated this, it is important to note the intervention of the Teamsters Union and the participation, *amicus curiae,* of the Chamber of Commerce of the United States. The presence of these parties does suggest an on-going interest in the issue raised in this litigation.

The procedural posture of this case makes it the antithesis of a "concrete" dispute. No testimony has been taken, no evidence adduced, no findings made. Thus, we are not faced with the prospect of stating that a lengthy trial must go for nought. Rather, we are asked to decide "questions of law" in somewhat of an abstract setting. Moreover, the real possibility of change in the regulations renders this case conjectural.[13]

---

12. In W. T. Grant, *supra,* and Trans-Missouri, *supra,* defendants' willingness to defend can be assumed to have been motivated by a desire to avoid the type of relief sought by the government and a fear of subsequent private treble-damage actions, strong motivators indeed.

13. As plaintiff-appellants' complaint and memorandum in support of their motion for preliminary injunction make clear, their challenge is aimed at an interpretative regulation promulgated by defendant-Commissioner. Interpretative regulations are among the most rapidly changing of the oft-changed components of welfare programs.

Finally, we must deal with the contention that this is a government program "capable of repetition, yet evading review." As will be developed, infra, that contention was raised but not met in ITT v. Minter, *supra*. The presence, in that case, of a still active labor dispute raises doubts about the argument that this is a situation capable of evading review. *See* Russo v. Kirby, 453 F. 2d 548 (2d Cir. 1971). Nevertheless, cognizant of the time required to perfect appeals both to this Court and to the Supreme Court, review may be unavailable in the majority of cases such as this.

Thus, to avoid holding that this case is moot, it must be found either that this appeal falls into the *Southern Pacific* category, or that the presence of the programs has an on-going direct effect on the appellants.

II.

The analysis of the mootness doctrine indicates that the continuing vitality of this case turns on two close issues: the "continuing effects" question and the *Southern Pacific* question. A resolution is, however, made simpler by a Supreme Court case, centrally important to determining the answers crucial to this appeal.

In Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l. Union, AFL-CIO v. Missouri, 361 U. S. 363 (1960), the union, representing employees of a private company selling natural gas, challenged the constitutionality of a Missouri statutory scheme, referred to as the King-Thompson Act. The Missouri legislation provided that, upon finding certain conditions present, the Governor could seize and operate a privately-owned public utility being struck, and that strikes against such facilities after the take-over would be unlawful. Having struck the gas company, that the Governor then seized, the employees were enjoined from further work stoppages, in accordance with the statutory

program. The day after the injunction issued, the strike ended. One month later the underlying labor dispute was resolved and eleven weeks after that the seizure was terminated. The union continued to appeal the issuance of the injunction and sought a declaration that the Missouri statute was unconstitutional, interfering with the workings of the National Labor Relations Act—the basis of the Supremacy Clause claim both in *Oil Workers* and in the present appeal—and further alleging that there was a violation of the Due Process clause of the Fourteenth Amendment. Although the Missouri Supreme Court adjudicated the union's appeal on the merits, the United States Supreme Court held that the expiration of the injunction and settlement of the labor dispute rendered the case moot.

In Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963), the same Missouri statute was challenged, there in the context of a labor dispute unsettled even when the case reached the Supreme Court. The Court, holding *Bus Employees* adjudicable, distinguished *Oil Workers* and Harris v. Battle, 348 U. S. 803 (1954), an earlier case relied on in *Oil Workers,* and stated that the resolution or continuation of the labor dispute was determinative of mootness.

> "Reliance for the claim of mootness is placed upon this Court's decisions in Harris v. Battle, 348 U. S. 803, and Oil Workers Unions v. Missouri, 361 U. S. 363. In the Oil Workers case the Court declined to consider constitutional challenges to the King-Thompson Act, and in the Harris case declined to rule on the constitutionality of a similar Virginia statute, on the ground that the controversies had become moot. *In both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here, by contrast, the labor dispute remains unresolved.*" 374 U. S. at 77-8 (Emphasis added).

The employers here contend that, despite the settlement of the labor dispute, the present case is not moot. In support of their position they urge that the termination of the strike does not end the injury they suffer, but rather that their ability to bargain collectively with the union when the contract is terminated is hampered by the very existence of the welfare programs. They next claim that, since collective bargaining has been held to be an on-going process,[14] there is still an active dispute to be adjudicated, and that they continue to suffer injury.

The second argument crucial to avoiding dismissal for mootness maintains that this case should be considered in the limited, *Southern Pacific* class of cases "capable of repetition, yet evading review." In *ITT Lamp Division*[15] the Court of Appeals for the First Circuit was presented with a case quite similar to the present one.[16] Responding to the mootness issue, the First Circuit stated that the problem did indeed appear to be "close to the 'recurring ques-

14. Our attention has been called to the cases of Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 (1946) and Aeronautical Industrial District Lodge 727 v. Campbell, 337 U. S. 521 (1949). Both cases dealt with the rights to reemployment of veterans returning from the Second World War. While it is clear that they can be said to stand for the proposition that collective bargaining is an on-going process, they do not address a problem similar to the one raised here and thus cannot be dispositive of the mootness problem.

15. Appellants point out that the United States Supreme Court denied certiorari in *ITT*, and did not vacate as moot. No conclusions may be drawn from the denial of certiorari. *See* Maryland v. Baltimore Radio Show, Inc., 338 U. S. 912 (1950) (Frankfurter, *J.*); H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 61 (1953).

16. The First Circuit, finding that there was not a federal preemption and that a balancing of the effects upon each other of the federal-labor and the joint federal-state welfare policies was required, held that this was a role more properly played by the Congress and affirmed the District Court's denial of relief. In view of our disposition of the case, we need not comment further on the First Circuit's action.

tion' category," citing *Southern Pacific,* 435 F. 2d at 991. The First Circuit, however, did not decide nor was it required to decide whether the issue was within the *Southern Pacific* ambit, for a second case, raising the same labor-welfare challenge, had already been joined on appeal, and in the latter case the strike had not yet been resolved.[17]

Oil Workers, however, responds to both questions essential to the employers' argument. In *Oil Workers,* just as in the present case, the threat to strike, labor's principal economic weapon, was affected by a state program. The employees in *Oil Workers* could have contended that their collective bargaining ability had been hindered by their employer's knowledge that a strike could provoke an injunction terminating the work stoppage, without resolving the dispute.[18] The present case would appear to be the obverse of this. Here, the employers can arguably claim that their collective bargaining ability is hindered by the employees' knowledge that a strike might be made more endurable through receipt of welfare benefits.

The Supreme Court, in *Oil Workers,* citing its earlier dismissal of Harris v. Battle, *supra,* squarely rejected both portions of appellants' argument:

> "In Harris v. Battle, 348 U. S. 803, these principles were given concrete application in a context so

---

17. Indeed, Judge Coffin stated, after discussing the *Southern Pacific* doctrine, "In any event, however, the appeal of Maurice Concrete [the appeal joined with *ITT,* in which the dispute had continued] presents the identical question." 435 F. 2d at 991.

The fact that a strike was still in existence at the time the appeal was before the First Circuit indicates that evasion of review is not inevitable.

18. In *Bus Employees,* supra, the Court stated that the threat of reinvocation of the seizure act in *Oil Workers* was only speculative. This may well be read to indicate that the detrimental effect on collective bargaining because of the "background fears" argument, alone, is not weighty enough to keep alive a controversy.

parallel as explicitly to control disposition of the primary issue here. That case originated as an action to enjoin the enforcement of a Virginia statute, markedly similar to the King-Thompson Act, under which the Governor had ordered that 'possession' be taken of a transit company whose employees were on strike. Although the labor dispute was subsequently settled and the seizure terminated, the trial court nevertheless proceeded to decide the merits of the case, holding that the seizure was constitutional. Harris v. Battle, 32 L. R. R. M. 83. The Virginia Supreme Court refused an appeal. Harris v. Battle, 195 Va. lxxxviii. In this Court it was urged that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U. S. 498, 514-516. In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U. S. 803. Upon the authority of that decision the same contentions must be rejected in the present case. See also Barker Co. v. Painters Union, 281 U. S. 462; Commercial Cable Co. v. Burleson, 250 U. S. 360. 361 U. S. at 368-9.[19]"

19. Three Justices dissented in *Oil Workers*. Their dissent, however, was bottomed on the possibility that striking union members might be liable for monetary damages or loss of seniority, a question the majority held not to be properly before the Court. No one expressed any doubts that the resolution of the labor dispute mooted the major issue in the case, the constitutionality of the injunction.

More recent Supreme Court pronouncements on mootness in labor cases have not significantly undercut the *Oil Workers* rule that settlement of the underlying labor dispute, absent special circumstances, requires a holding of mootness. *See* Sears, Roebuck & Co. v. Carpet Layers, 397 U. S. 655 (1970).

In Liner v. Jafco, Inc., 375 U. S. 301 (1964), a Tennessee state court enjoined picketing at a building site, and required the contractors who had sought the injunction to post a bond to indemnify petitioners if the injunction were "wrongfully" sued out. The Tennessee Court of Appeals, finding that the construction at the site had been completed, dismissed the enjoined picketers' challenge as moot. The U. S. Supreme Court, holding that mootness is a federal question, addressed the issues raised by the petitioners. The Court held that the petitioners, whose federally protected rights might have been abridged, and for whose benefit the bond had been posted, had a substantial continuing stake in the litigation both because their rights had already been abridged and because provision had been made to redress such deprivation if found unlawful. In the case now pending, such considerations are not present. Moreover, state court interference with labor problems arguably within the exclusive jurisdiction of the NLRB is a matter which the Supreme Court held particularly important previously, and therefore felt compelled to adjudicate the case.

The cases discussed in Part I of this opinion, while perhaps indicating some lessening of the mootness stricture, do not appear to affect the vitality of *Oil Workers* in a labor context. If *Oil Workers* is to be found not harmonious with the current contours of the mootness doctrine, that decision should, and perhaps must, be made by the U. S. Supreme Court.

The *Oil Workers* case requires that we dismiss this appeal. The lack of immediacy and solidity of interest necessary to support jurisdiction is reflected here in the atmosphere of abstraction, ambiguity, and conjecture surrounding this matter. Accordingly, we now dismiss this appeal as moot with directions to the District Court, on remand, to vacate and dismiss for the same reason. *See* United States v. Munsingwear, 340 U. S. 36 (1950). *Cf.* Socialist Labor Party v. Gilligan, 406 U. S. at 592-3, n. 3 (Douglas, J. dissenting).

This disposition is consonant with a proper appreciation of the role of the federal judiciary when asked to decide the constitutionality of state statutes and programs. In such cases, our task does not involve conjuring up situations to preserve an otherwise quiescent issue, nor does our assignment include constitutional adjudication unless such is necessarily implicated in the decision of a case or controversy squarely before the Court. *See* Ashwander v. TVA, 297 U. S. 288, 346-8 (1936) (Brandeis, J. concurring). Because we act only when required, can we legitimately act at all. The issue presented to the Court is now moot, therefore, we must stay our hand.

An order will be prepared, remanding the case to the District Court for disposition consistent with this opinion.

GIBBONS, *C. J.*, dissenting.

This is an appeal from a dismissal by the district court pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief may be granted. The appellants are two New Jersey corporations engaged in the tire sales and service business. According to the complaint, all their production and service employees are represented by the intervenor defendant, Teamsters Local Union No. 676. On May 14, 1971, upon the expiration of

a collective bargaining agreement which had been in effect since May 15, 1968, the local struck as a result of the parties' failure to reach a new agreement. According to the complaint, that strike was still in progress when the complaint was filed on June 10, 1971. The only hearing was that held on June 24, 1971. That hearing was on the plaintiffs' motion for a preliminary injunction, in support of which the plaintiffs were prepared to offer testimony. At the hearing the intervening defendant, Local Union No. 676, was permitted to intervene; the Attorney General, representing the public official defendants, was permitted to make an oral motion to dismiss for lack of jurisdiction under 28 U. S. C. § 1337, upon which the court never ruled. The intervening defendant was permitted to make an oral motion to dismiss for failure to state a claim upon which relief may be granted. In advancing the Rule 12(b)(6) motion, counsel for the local relied upon the opinion of the First Circuit in *ITT Lamp Division v. Minter*, 435 F. 2d 989 (1st Cir. 1970), *cert. denied*, 402 U. S. 933 (1971); although, as that opinion makes clear, the district court decision reviewed was the denial of a preliminary injunction after an evidentiary hearing. The district court below declined to take testimony, and dismissed solely upon the basis of the allegations in the complaint. Thus, assuming that the case is still justiciable, our review would be confined to the legal sufficiency of the allegations of the complaint, in particular the allegations in paragraph 14:

> "Plaintiffs believe and therefore aver that the payment by the State of New Jersey through its instrumentalities and political subdivisions, pursuant to the aforesaid interpretative regulation, of public assistance and public welfare benefits to individuals and the families of individuals who voluntarily leave their

> employment to directly engage in and actively participate in an economic strike against their employer, interferes with and infringes upon free collective bargaining as guaranteed to Plaintiffs by Congress under the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 141 *et seq.;* constitutes an intrusion by the State of New Jersey into the field of labor-management relations which Congress has preempted and occupied to the full extent of its powers; and, accordingly, violates Article VI, Clause 2 of the Constitution of the United States."

At the hearing the plaintiffs were prepared to offer testimony in support of their claim that the availability of welfare benefits for strikers did in fact interfere with and infringe upon free collective bargaining. The absence of such proof at the hearing upon the preliminary injunction was relied upon by the *Minter* court as one reason, among others, for affirming the denial of a preliminary injunction in that case. Here, the plaintiffs were prepared to offer such evidence, but the court ruled that the complaint failed to state a cause of action. Reading the complaint as a whole, and particularly paragraph 14, it is perfectly clear that the gravamen of the charge is that the *availability* of strike benefits adds the economic power of the state to the union side, and thereby interferes with the *collective bargaining relationship.*

Thus, this controversy is moot only (1) if welfare benefits to strikers are no longer available, or (2) if there is no longer a collective bargaining relationship which can be affected by such availability. It is clear from the briefs filed on behalf of the public defendants that welfare benefits are still available to strikers in New Jersey, and that the state has no present intention of changing its

policy with respect to such payments. Thus, the only basis upon which this controversy may be classified as moot is a finding that there is no longer a collective bargaining relationship which can be affected by the acknowledged continued availability of welfare benefits for strikers.

Since no testimony was taken in the district court, the record is almost totally devoid of any facts with respect to the actual status of the collective bargaining relationship. The judges in the majority act upon the conflicting representations of counsel as to the date of termination of the strike. The opinion states:

> "The union states that the strike 'ended immediately prior to the June 24, 1971 hearing.' The employers allege that the 'employees did not return to work until June 28, 1971.' Under either factual situation, a new contract having been accepted and ratified, it is clear that the labor dispute undergirding this challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before appeals were filed or argued in this Court." (footnote omitted)

With deference, it is a long logical leap from the very little information furnished to us upon which counsel agree, and the conclusion drawn by the majority. Among the unanswered questions are these:

A. There is a contract, but is it of long or short duration?

B. If it is of short duration, will collective bargaining over terms of its renewal, extension or modification continue while it is in effect?

C. Whether it is of long or of short duration, does it have a binding grievance/arbitration and no-strike

provision, or is the union free to strike over grievances?

D. Will the availability of welfare benefits to strikers have any effect upon the bargaining relationship in any of the above situations?

The plaintiffs vigorously assert that the bargaining relationship is still affected by the availability of strike benefits. If the record established that the parties were in year one of a three-year labor contract with a no-strike clause, I would agree that the controversy might be too speculative to warrant decision. Short of that situation, the impact on the collective bargaining relationship of the availability of welfare benefits to strikers may be quite real and immediate. But we simply do not know what the situation is because the plaintiffs were deprived of the opportunity of making a record in the district court. The analytical unsoundness of the majority's position is reflected in its reliance, in support of its mootness conclusion, on that very deprivation. The opinion states:

> "The lack of immediacy and solidity of interest necessary to support jurisdiction here is reflected in the atmosphere of abstraction, ambiguity, and conjecture surrounding this matter."

If there is abstraction and ambiguity it arises from the absence of a record. If there is conjecture, the conjecture is by the majority of this panel. Their conclusion that there is no collective bargaining relationship which may be affected by the availability of welfare benefits to strikers is entirely conjectural. Appellate decision making cannot be reduced to scholastic disputation about rules to be drawn from previously decided cases. It must first of all be grounded in facts. There is no more justification for mak-

ing a hypothetical or conjectural decision upon an issue of alleged mootness than upon an issue going to the merits.

This case can be regarded as having been made moot by the termination of the strike only if we construe the complaint as addressed to the protection of the integrity of the collective bargaining relationship only during the pendency of a strike. But it cannot fairly be so construed. Collective bargaining over contract terms more often than not goes on for months before a strike. Collective bargaining over grievances may go on continuously. The complaint seeks to unfetter the collective bargaining relationship from alleged interference by New Jersey. The relationship for which the protection of the court has been sought is a continuing one. *See NLRB v. Newark Morning Ledger,* 120 F. 2d 262, 267 (3d Cir.), *cert. denied,* 314 U. S. 693 (1941).

In the context of the protection of a continuing relationship perhaps only two of the many decisions discussed in the majority opinion are relevant, *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U. S. 275 (1946); *Bus Employees v. Missouri,* 374 U. S. 74 (1963).

In *Fishgold* a veteran was laid off by his employer in compliance with the seniority provisions of a collective bargaining agreement. He sued the employer for damages and for a declaratory judgment that his layoff was in violation of Section 8(c) of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 301. The labor union intervened, taking a position in defense of the validity of contract seniority provisions. The district court awarded money damages to the veteran, and only the union appealed. Meanwhile, the one-year statutory veteran's preference period for the original veteran plaintiff's employment had expired. The Supreme Court held that the union, because of the ongoing relationship between it and the employer by virtue of the labor contract, had standing to appeal. Since the contract was still in ex-

istence, the case was not moot. *Fishgold* is, of course, only authority for the instant case by way of analogy. But the analogy is closer than in any of the cases upon which the judges in the majority rely.

Bus Employees, as the majority opinion points out, dealt with the validity of a Missouri statute which gave the governor of that state the authority to seize the facilities of a public utility in the event of a strike, and to operate them in the public interest. The statute was challenged on the same basis as is the New Jersey regulation on welfare benefits to strikers challenged here, interference with a relationship regulation of which has been preempted by paramount federal law. While the case was on appeal the governor terminated the seizure. Missouri then urged mootness, relying on *Oil Workers Unions v. Missouri,* 361 U. S. 363 (1960), a case involving the identical statute. The court declined to dismiss as moot, and held the Missouri statute unconstitutional. It distinguished *Oil Workers* because in that case both the labor dispute and the seizure had ended, whereas in *Bus Employees* the strike had not ended and the availability of the seizure device as an available means of terminating it had an ongoing effect. *Bus Employees,* again, is only analogous authority since the plaintiffs sought the protection of the right to strike, a right lawful under the National Labor Relations Act which Missouri attempted to make unlawful. But on the mootness issue the case is quite closely in point, for it recognizes that the availability of state interference can have an ongoing effect upon the collective bargaining relationship, and that a controversy over such availability is not moot, as long as the affected relationship exists.

The issues in this case are of considerable public interest, and likely to recur. Overanxiety on the part of the federal courts to find such cases non-justiciable is not

consistent with our judicial obligations. As Judge Coffin said in a similar context:

> "Although the strike against ITT was subsequently settled, the issue, we know from our own experience, has earlier vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the 'recurring question' category, where significant public rights are involved and court review ought not, if possible, be avoided. *See* So. Pac. Terminal Co. v. I. C. C., 219 U. S. 498, 515-516, 31 S. Ct. 279, 55 L. Ed. 310 (1911) and Marchand v. Director, U. S. Probation Office, 421 F. 2d 331 (1st Cir. 1970)." *ITT Lamp Division v. Minter, supra,* at 991.

We cannot without a record properly hold that this case is moot. At the same time, since there is no record, we cannot rule out the possibility that the situation of the parties has so changed as to render the case moot. The issues involved are complex and their proper resolution far from clear. *Compare ITT Lamp Division v. Minter, supra, with John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance,* 349 Mass. 390, 208 N. E. 2d 516 (1965). I would remand the case to the district court for a hearing to determine first, the actual collective bargaining relationship between the parties, and next, in what way, factually, that actual relationship is affected, if at all, by the availability of welfare benefits to strikers. Only with such a record can we properly decide if there is still a genuine case or controversy, and, if so, how it should be resolved.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773/71-1775.

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; AND JUANITA E. DICKS; WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY
INTERVENOR: LOCAL 676, TEAMSTER UNION, ETC.
SUPER TIRE ENGINEERING COMPANY,
Appellant in No. 71-1773,

SUPERCAP CORPORATION,
Appellant in No. 71-1774,

A. ROBERT SCHAEVITZ,
Appellant in No. 71-1775.

(D. C. CIVIL ACTION No. 853-71)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeals in these cases be, and the same are hereby dismissed as moot, and the cause remanded to the said District Court with directions to vacate its judgment, filed July 13, 1971, and to dismiss for the same reason, all in accordance with the opinion of this Court. Costs taxed against appellants.

ATTEST:

THOMAS F. QUINN,

Clerk.

November 22, 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773, 774 AND 775.

SUPER TIRE ENGINEERING COMPANY, ET AL.,
Appellants,

v.

LLOYD W. McCORKLE, ET AL.,
Appellees.

Present: McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

ORDER.

Amicus status in this appeal is hereby granted to the United States Chamber of Commerce.

The affidavit of Professor Northrup will be received and filed with the record.

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Dated: November 22, 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 71-1773, 71-1774, 71-1775.

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION AND A. ROBERT SCHAEVITZ,
Appellants,

v.

LLOYD W. McCORKLE, ET AL.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* MCLAUGHLIN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

The petition for rehearing filed by SUPER TIRE ENGINEERING COMPANY, SUPERCAP CORPORATION and A. ROBERT SCHAEVITZ in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

ARLIN M. ADAMS,
Judge.

Dated: December 20, 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773, 71-1774, 71-1775.

SUPER TIRE ENGINEERING COMPANY,
SUPERCAP CORPORATION AND
A. ROBERT SCHAEVITZ,

Appellants,

v.

LLOYD W. McCORKLE, ET AL.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* McLAUGHLIN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

The petition for rehearing en banc of this Court's panel order of November 22, 1972, filed by Chamber of Commerce of the United States of America in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
ARLIN M. ADAMS,
Judge.

Dated: December 20, 1972

SUPREME COURT OF THE UNITED STATES

No. A-941.

SUPER TIRE ENGINEERING COMPANY, ET AL.,
Petitioners,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 19, 1973.

/s/ WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 12 day of March, 1973

ORAL OPINION.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

CIVIL ACTION No. 853-71.

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; AND
A. ROBERT SCHAEVITZ,

Plaintiffs,

v.

LLOYD W. McCORKLE, ET ALS.,

Defendants.

Camden, New Jersey.
June 24, 1971.

Before: HONORABLE JOHN J. KITCHEN, *U. S. D. J.*

• • •

[20]

The Court: Gentlemen, as I understood our discussion before we came into Court, there was a desire to have this determined on the merits at this time. Is that right, Mr. Keene?

Mr. Keene: Yes.

The Court: Consolidated with the request for the injunction and so forth?

Mr. Keene: That's correct, sir.

The Court: Gentlemen, I have read for I don't know how many times, but I

[21]

have read again this I. T. T. Case, which has been referred to; and on the basis of that, the Court has determined not to take testimony. I accept the ruling of Judge Coffin's opinion in that case and I feel that that case, as I interpret it, is controlling, because I feel that any action in this matter such as those enumerated in the case and in which they said, they are going to be reoccurring, I feel, that such rulings or such testimony should be heard by Congress for whatever action they deem appropriate. On that basis, I am going to grant the motion to dismiss and of course, that will deny the injunction.

(Where upon the hearing was concluded.)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

CIVIL ACTION NO. 853-71.

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Plaintiffs,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY;

IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY;

FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD;

JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; AND

TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

ORDER.

This matter having come on for Final Hearing on the merits pursuant to F. R. C. P. 65(a)(2) on June 24, 1971;

And the Court having heard oral argument by counsel for all parties hereto;

And based upon existing law and for other good cause shown;

It is on this 13th day of July, 1971, ORDERED that plaintiffs' Motion for Preliminary Injunction be and the same hereby is dismissed;

It is FURTHER ORDERED that the Complaint filed in this matter be and the same hereby is dismissed without costs.

/s/ JOHN J. KITCHEN,
John J. Kitchen,
J. U. S. D. C.

July 13, 1971.

STATUTES INVOLVED.

United States Constitution.

ARTICLE VI.

Clause 2. Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

National Labor Relations Act, 29 U. S. C. § 158.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

New Jersey Public Assistance Law

NJSA 44:8-107 et seq.

44:8-107. Short title.

This act may be cited as the "General Public Assistance Law."

44:8-108. Definitions.

As used in this act:

"Commissioner" means the Co-ordinator of the Department of Economic Development;

"Department" means the Department of Economic Development;

"Municipality" shall include any city, borough, township, town, village or municipality governed by a board of commissioners or an improvement commission;

"Public assistance" means assistance rendered to needy persons not otherwise provided for under the laws of this State, where such persons are willing to work but are unable to secure employment due either to physical disability or inability to find employment, and includes what is commonly called "relief" or "emergency relief";

"State aid" means State aid for public assistance or relief as in this act prescribed and provided for;

"Year" means calendar year.

* * *

44:8-114. Municipalities to provide public assistance; administration.

Every municipality shall provide public assistance to the persons eligible thereto, residing therein or otherwise when so provided by law, which shall be administered by a local assistance board according to law and in accordance with this act and with such rules and regulations as may be promulgated by the commissioner.

REGULATIONS.

M. A. 1.006
Rev. 3/57

State of New Jersey

Department of Institutions and Agencies

Division of Welfare—Bureau of Assistance

TITLE: REIMBURSEMENT

SUBJECT: EMPLOYABILITY AS A CONDITION OF ELIGIBILITY

A. *Citation of Statute and Constitution*

Chapter 156, P. L. 1947 (R. S. 44:8-108) defines reimbursable public assistance as "assistance rendered to needy persons not otherwise provided for under the laws of this State, *where such persons are willing to work* but are unable to secure employment due either to physical disability or inability to find employment."

The Constitution of New Jersey 1947, Article I, paragraph 19, guarantees that "Persons in private employment shall have the right to organize and bargain collectively."

B. *Interpretation and Policy*

It may be inferred from the quoted section of the statute that persons unwilling to work are ineligible for public assistance. However, for purposes of public administration, the phrase "unwilling to work" must be defined as objectively as possible. For this purpose, therefore, it is interpreted that a person may be considered unwilling to work only when all of the elements of either (1) or (2) following are present:

(1) He is physically and mentally capable of engaging in remunerative employment or self-employment; and

he refuses, without just and reasonable cause, to seek such employment or self-employment, or to make himself available for referral to, or consideration by prospective employers; OR

(2) He is physically and mentally capable of engaging in remunerative employment or self-employment; and such employment or self-employment is available to him; and he refuses, without just and reasonable cause, to accept such employment or engage in such self-employment.

At the same time, the effect of the Constitutional provision cited above must be considered. The Constitutional guarantee of the "right to organize and bargain collectively" implies the right of the individual to participate in a bona fide labor dispute as between the employer and the collective bargaining unit by which the individual is represented. Moreover, a "strike", when lawfully authorized and conducted, is recognized as an inherent and lawful element of the process of bargaining collectively and of resolving labor disputes. Accordingly, when an individual is participating in a lawful "strike," he may not be considered merely because of such participation, as refusing to work without just cause.

C. *Regulations*

Based on the foregoing statement of interpretation and policy, the following regulations are established:

1. Employability is a resource to be considered in determining eligibility for public assistance.

2. When it is clearly established that an individual is able to work, and that he refuses, without just and reasonable cause, to seek work, or to make himself avail-

able for referral to and consideration by prospective employers, he shall be deemed ineligible for public assistance.

3. When it is clearly established that an individual is able to work, that a specific job within his capabilities is available to him, and that there is no just and reasonable cause for a refusal to accept the job so available, if he nevertheless refuses to accept the employment, he shall be deemed ineligible for public assistance.

4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute.

5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, "strike benefits" or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for.

7. The right of persons to bargain collectively with an employer does not imply the right to bargain collectively with the public assistance agency; and the right of individuals to apply for public assistance does not carry with it a right to apply collectively for public assistance through an agent or representative.

8. If an individual is found to be disqualified for public assistance because of wrongful refusal to seek or accept available employment (as provided in regulations #2 and #3 above), such disqualification shall not affect the eligibility of his spouse, minor children, or other persons in his household, if they are needy persons.

9. Assistance which is granted consistently with these regulations and all other eligibility conditions, to a needy person, will not be excluded from matching State aid merely because such person is engaged in a lawful labor dispute.

DEPARTMENT OF INSTITUTIONS AND AGENCIES

/s/ IRVING ENGELMAN
Irving Engelman, Chief
Bureau of Assistance

IE/MCRd
Approved
Elmer V. Andrews, Director
Division of Welfare

Official Regulation 1.006, revised 3/57
Destroy Regulation 1.006, revised 3/1/48

New Jersey Assistance for Dependent Children Law, NJSA 44:10-1 et seq.

44:10-1. Definitions.

As used in this act and for the purpose of the determination of eligibility to receive financial assistance under the provisions of this act, the following words shall have the following meaning, unless the context indicates another meaning:

(a) "Assistance for dependent children" means the assistance and other services to be extended under this act to or for needy dependent children and the parents and relatives with whom they are living for the following purposes:

(1) To provide for the care of needy dependent children in their own homes or in the homes of relatives, under standards and conditions compatible with decency and health.

(2) To help maintain and strengthen family life, and

(3) To help such parents or relatives to attain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

(b) "Bureau of Assistance" means the Bureau of Assistance of the Department of Institutions and Agencies.

(c) "Dependent child" means a child under the age of 18, or under the age of 21 and a student regularly attending school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment, who

(1) Has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or, when living with both parents, has been deprived of parental support or care by reason of the unemployment of his father or the insufficient earnings of his parents, and

(2) Is living in New Jersey with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their home, and

(3) Is found, after due investigation and determination, according to standards and procedures established pursuant to this act, to be in need of financial assistance.

(d) "Parent or relative with whom a dependent child is living" means a person

(1) Who is related to the dependent child, in the manner prescribed in subsection (c)(2) of this section, and

(2) With whom the dependent child is living in a place of residence maintained by one or more of such relatives as his or their own home, and

(3) Who is found, after due investigation and determination, according to standards and procedures established pursuant to this act, to be in need of financial assistance.[1]

* * *

1. See footnote 3, in text of Petition, *supra*, with respect to New Jersey's election to no longer participate in the Unemployed Parent segment of the joint federal-State Aid to Families with Dependent Children program, 42 U. S. C. § 607.

Social Security Act of 1935, as Amended, 42 U. S. C. § 602 et seq.

§ 602. State Plans for Aid and Services to Needy Families With Children; Contents; Approval by Secretary.

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and (6) provide that the State agency will make such reports, in such forms and containing

such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not

apply to earned income derived from participation on a project maintained under the programs established by section 632(b)(2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the

income of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

* * *

§ 606. Definitions.

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the

needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e) (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age 21 who is (or, within such period as may be specified by the Secretary, has

been) living with any of the relatives specified in subsection (a) (1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

§ 607. Dependent Children of Unemployed Fathers; Definition.

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with

standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a) (19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1) of this section, or

(ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified to refer such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

New Jersey Assistance to Families of the Working Poor Law, NJSA 44:13-1 et seq.

44:13-1. Legislative findings.

The Legislature hereby finds and declares that it is in the public interest for the State to provide financial assistance to New Jersey families with children in which both parents are present in the home and who otherwise meet the eligibility criteria set forth in this act by virtue of inadequate income for the support of the family. The Legislature further finds that such families are a unique class, distinguishable in their composition and needs from other categories of persons benefited by other programs of assistance established by law. The Legislature further finds that such families should be entitled to receive the benefits available under the "New Jersey Medical Assistance and Health Service Act."

44:13-2. Establishment of program; administration.

There is hereby enacted by the State of New Jersey a program of assistance to be known as "Assistance to the Families of the Working Poor" which shall benefit all of the citizens of New Jersey meeting the eligibility provisions more particularly set forth in section 3 of this act. This program shall be administered by all of the county welfare boards of this State under the direction of the Commissioner of Institutions and Agencies as provided in this Title.

44:13-3. Definitions.

As used in this act and for the purposes of determining eligibility to receive financial assistance under this act, the following words shall have the following meanings:

a. "Assistance to the Families of the Working Poor" means the financial assistance and other services to be extended under this act to those families residing in New Jersey which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child under the age of 18 residing with them, who shall be either the natural child of both, the natural child of one and adopted by the other, or a child adopted by both, and have (i) no income or insufficient income and (ii) no other resources or insufficient other resources, where such absence or insufficiency of income or resources is not the result of a voluntary cessation of employment within 90 days prior to the date of application, or the result of a voluntary assignment or transfer of property within one year prior to the time of application for the purpose of qualifying for public assistance;

b. "Adjusted gross income" means the total of monthly unearned income and monthly earned income of all employed individuals in the family, except for those individuals whose income is required to be disregarded under the provisions of this subsection, less the first $60.00 earned by each person whose income is included in adjusted gross income. In computing the income of a family as defined in this act there shall be disregarded the *earned* income of any minor child under 16, and the income of a minor child under 18 if he or she is attending on a full time basis an accredited educational institution;

c. "Insufficient income" means that the adjusted gross income of the family is less than 66⅔% of the standard applicable to the size of the applicant family established by the Division of Public Welfare for the program of aid to dependent children authorized under P. L. 1959, c. 86 (C. 44:10-1 et seq.);

d. "Other resources" means all property and assets, as otherwise defined by the Division of Public Welfare for the program of aid to dependent children authorized under P. L. 1959, c. 86 (C. 44:10-1 et seq.), legally or beneficially owned by a member or members of the families which are or can be readily made available for the use of the family;

e. "Insufficient other resources" means that other resources are insufficient as determined by standards set forth by the Director of the Division of Public Welfare pursuant to P. L. 1959, c. 86 (C. 44:10-1, et seq.); and

f. "Commissioner" shall mean the Commissioner of Institutions and Agencies.

44:13-4. Application for assistance; form; signature; other financial assistance from state; failure of father to improve employment situation.

a. A family wishing to make application for assistance under the provisions of this act shall do so by securing from the county welfare board offices an application, the form of which shall be prescribed by the Division of Public Welfare. Said application shall be completed and signed by both parents, except that if a parent is unavailable to sign the application for reasons beyond the family's control one signature will suffice. In that event the non-signatory parent shall be required to annex his signature as promptly as he is available for such purpose. Said application shall state that the amounts of assistance received by the applicants, if they are eligible, shall constitute a debt to the State of New Jersey as required by the provisions of this act.

b. No family or member thereof for whom financial assistance is being paid under the provisions of this act

shall receive, during the same period, any other financial assistance from the State or any political subdivision thereof with respect to any maintenance requirements or other items for which allowance is made in the assistance grant paid pursuant to this act.

c. No family shall be entitled to receive financial assistance under this act if the father refuses, without good cause, to accept employment, better employment or training for employment or better employment.

44:13-5. Powers of commissioner; rules, regulations and orders; obtaining maximum federal aid.

Under general policies established by the State Board of Control consistent with the provisions of this act, the commissioner is authorized, directed and empowered to issue, or to cause to be issued by the appropriate departmental officers or agencies, in accordance with the "Administrative Procedure Act" (P. L. 1968, c. 410), all necessary rules and regulations and administrative orders, and to do or cause to be done all other acts and things necessary to implement the provisions of this act. He shall endeavor to obtain the maximum possible Federal financial participation with respect to all or any portion of the program established by this act, insofar as it is feasible to do so consistently with the provisions of this act.

44:13-6. Duties of commissioner.

The commissioner is directed to do the following:

a. Require that the program of assistance provided by this act shall be uniformly administered throughout all the counties of this State;

b. Require that all families wishing to make application for assistance under this program shall have the

opportunity to do so, in the manner described in this act and that assistance shall be furnished with reasonable promptness to eligible families;

c. Require that safeguards be provided restricting the use or disclosure of information concerning applicants and recipients of aid under the provisions of this act;

d. Arrange for appropriate services and cooperation with other agencies so that maximum opportunities for employment or improved employment and training for employment will be available to recipients of assistance under this program;

e. Prescribe the conditions under which financial assistance will be denied to any family in which the father refuses, without good cause, to accept employment, better employment, or training for employment or better employment;

f. Provide a procedure whereby an applicant for or a recipient of assistance under the provisions of this act shall have an opportunity to appeal an action or decision of a county welfare board to the Division of Public Welfare of the Department of Institutions and Agencies. Such appeal shall be taken within 90 days from the date of the action or decision of the county welfare board upon which the applicant or recipient bases his appeal.

LIBRARY
SUPREME COURT, U. S.

No. 72-1554

FILED
JUN 8 1973
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO INTERVENE

MILTON SMITH,
General Counsel,

O. F. WENZLER
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N.W.
Washington, D.C.

GERARD C. SMETANA,
925 South Homan Avenue
Chicago, Illinois 60607

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South La Salle Street
Chicago, Illinois 60603

Of Counsel:
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C.

© The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO INTERVENE

The Chamber of Commerce of the United States of America ("the Chamber"), by its attorneys, hereby moves this Court for leave to intervene in this proceeding and, in support thereof, states the following:

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers, including many located within the State of New Jersey, in important labor relations matters

vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions and is one of the basic reasons for its existence. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation both before this Court and numerous of the Circuit Courts of Appeals. Illustrative recent cases before this Court in which the Chamber has so participated include *N.L.R.B.* v. *The Boeing Company, et al.*, ... U.S. ....., Nos. 71-1417, 1607; *N.L.R.B.* v. *International Van Lines*, ... U.S. ....., No. 71-895; *N.L.R.B.* v. *Granite State Joint Board*, ... U.S. ....., 34 L. Ed. 2d 422 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Burns International Security Services, Inc.*, ... U.S. ....., 80 LRRM 2225 (1972); *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

3. The issues presented in this case are of particular import to the Chamber's members. With respect to the question of mootness presented for review here, should this Court decline to grant the instant petition and thus leave standing the decision below, one of the principal functions performed by the Chamber for its members would be greatly curtailed; similarly, one of the major benefits reaped from membership in the Chamber would be removed. For the Chamber frequently litigates in its members' interests cases presenting recurring issues of significance where the immediate dispute before the courts may neither require nor permit relief to the named parties to the dispute, but where a repetition of the challenged conduct will exert major harm to the Chamber's members. The holding below would substantially inhibit the Chamber from engaging in such conduct since many of the cases in which the Chamber would seek to perform its representative role would be deemed moot. Intervention is sought at this time because it was only in the decision of

the circuit court below that the finding of mootness was made which is so prejudicial to the Chamber and its members.

4. With respect to the merits of the instant dispute, which the court below deemed moot, the question as to whether a state may subsidize one party to a labor dispute by providing welfare benefits to his striking employees is of such apparent concern to the employer-members of the Chamber as to obviate extended discussion of the Chamber's continuing interest in that question. Suffice it to state that the Chamber has participated in the litigation of that question in various lower courts, is the only party which has consistently done so and is thus uniquely able to contribute to its proper resolution.[1]

5. By virtue of its continuing concern with the substantive question of the propriety of welfare payments to striking employees, the Chamber both constitutes the real party in interest in such cases and satisfies the fundamental criterion of non-moot cases,—the existence of a viable and interested combatant prepared fully to litigate the issues involved. The Chamber's intervention here is therefore appropriate and affirmatively prevents this case from becoming moot and evading review.

Accordingly, the Chamber moves this Court for leave to intervene in this proceeding.

---

[1] In the various cases in the lower courts raising this substantive question in which the Chamber has participated, that participation has been as a party. Thus, the Chamber was permitted to intervene, over the opposition of other parties, in both *Grinnell Corp.* v. *Hackett*, ... F. 2d ....., 82 LRRM 2986 (CA1, 1973) and *Russo* v. *Kirby*, 453 F. 2d 548 (CA2, 1971); the Chamber's motion to intervene is pending in *Francis* v. *U.S. Chamber of Commerce*, CA4, Civil No. 72-1537; and, over opposition, the Chamber has been permitted to participate as a party-plaintiff in pending proceedings in *Dow Chemical Co. and the Chamber of Commerce of the United States of America* v. *Taylor* (E.D., Mich., Civil No. 38644).

ARGUMENT IN SUPPORT OF MOTION TO INTERVENE

In its decision below, the circuit court held, in reliance upon the supposed holding of this Court in *Oil Workers Local 8-6* v. *Missouri*, 371 U.S. 363 (1960), that in cases arising in the field of labor law the termination of the dispute between the immediate parties rendered the matter moot for all purposes, regardless of considerations which would, in other fields, nonetheless result in a decision on the merits. Thus, the court below would find irrelevant *in labor law matters only* the fact that the issue presented is a recurring one, that it may be inherently evasive of review, that a failure to decide it will result in continuing confusion and jeopardy in future cases, that the issue involves a matter of great conceptual and practical importance, that its non-resolution may have lingering effects and that the parties then before the court are prepared fully and competently to litigate the case.

Wholly apart from the importance of obtaining both a resolution of the correctness of the described holding below and a clarification as to whether this Court's decisions in such "mootness" cases as *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), *United States* v. *Grant*, 345 U.S. 629 (1953), and *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) also apply to cases arising under the labor laws, the Chamber should be permitted to participate in such deliberations as a party in view of its special interest in and potential jeopardy from the rule which would result. The Chamber's special status results from the following circumstances:

First, the decision of the court below would deprive the Chamber of the opportunity to perform for its members important representative functions which it now performs.

On behalf of its members' interests, the Chamber frequently participates in the litigation of significant cases involving the labor laws whose impact upon the future welfare of its members is thought to be substantial. While the Chamber does on occasion bring such suits in the first instance, more commonly it acts as an intervenor or an *amicus curiae* in suits brought by others. This is a major component of the services which the Chamber performs and is one of the strong inducements for membership. Since, in cases presenting important and recurring questions of law, the specific dispute between the parties may be resolved before the cases reach the appellate level at which the Chamber so frequently participates, the question as to whether a case necessarily becomes moot upon such a resolution has an enormous impact on the Chamber's performance of its representative functions. On the mootness question presented in the instant petition, therefore, the Chamber has a more vital interest than do the named parties to the suit.

Second, since the Chamber limits its judicial participation to those cases which, by their very nature, will often recur and whose issues have the most far-reaching and serious consequences to its members' future welfare, therefore, the decision below, if permitted to stand, will greatly prejudice the interests of the Chamber's members. They will, in that eventuality, unnecessarily be deprived of judicial guidelines by which to gauge their conduct and preserve their rights, although, in any other field of law, those guidelines would be afforded and the case not held moot. Thus, the Chamber's members, more than the named parties to this case, have a vital stake in its outcome. With respect to the substantive issue involved in this case, for example, while it is possible that the petitioner, Supertire Engineering Co., may be again faced with the issue of the

right of a state to make welfare payments to its striking employees, it is a certainty that many of the Chamber's members will repeatedly be confronted by that question and its severe practical implications.

Third, the Chamber should be granted intervention because it is a real party in interest in this case and its participation prevents the case from being "moot." Both the majority and the dissent below noted that the Chamber and the Teamsters Union, neither being named or formal parties to the suit, were the real parties in interest whose presence in the case ". . . does suggest an ongoing interest in the issue raised in this litigation." In *Grinnell Corp.* v. *Hackett,* ..... F. 2d ....., 82 LRRM 2986 (CA 1, 1973) (Petition for writ of certiorari filed May 5, 1973), another case involving the propriety of a state's payment of welfare for strikers, the First Circuit specifically concluded that it was the involvement of the Chamber and the certainty that its members would be affected by recurrences of the problem, which rendered that case non-moot. Thus, one of the recognized criteria for the existence of a justiciable controversy,—viable combatants anxious and prepared fully to litigate the issues,—is provided in this case by the presence and participation of the Chamber. See *Fishgold* v. *Sullivan Drydock and Repair Corp.,* 328 U.S. 275 (1946), holding that the presence of an intervenor with an independent interest precluded mootness.

Fourth, the Chamber is a particularly appropriate participant in this case, which raises an important question concerning the nature of the doctrine of mootness, since it participated and thus had a role in the decision of other cases on mootness with which the decision below is in conflict. *Grinnell Corp.* v. *Hackett, supra; I.T.T. Lamp Division* v. *Minter,* 435 F. 2d 989 (CA 1, 1970); *Terminal*

Freight Cooperative Assn. et al. v. *Solien*, 440 F. 2d 124 (CA 8, 1971). In each of these cases, in which the Chamber either intervened or participated as *amicus curiae*, the courts accepted the argument, in a labor law context, that the existence of an important public question which will recur and would otherwise tend to evade review warranted judicial resolution.[2]

Finally, absent intervention in this proceeding, it would be impossible for the Chamber to challenge the mootness conclusion reached below. While the Chamber could bring an independent action to test the propriety of welfare payments to strikers, such an action would neither necessarily test nor resolve the important mootness question presented in the petition in this case which so seriously jeopardizes both the continuing functioning of the Chamber and its members' legitimate interests.

---

[2] According to the court in *Terminal Freight*, a decision in irreconcilable conflict with the opinion below:

> "We do not think this case is moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the "mere probability" test articulated in *United States* v. *W. T. Grant Co.* . . . In our view, a case is justiciable 'if there is a probability that the challenged conduct will recur and it is possible that the challenging party will be affected should recurrence take place' . . . We believe that the doctrine of mootness should not be used to perpetually frustrate review of issues of public importance arising in otherwise justiciable cases. . ." (Quoting Comment, 83 Harv. L. Rev. 1672, 1692)